VIRGINIA:

IN THE CIRCUIT COURT FOR FAIRFAX COUNTY

COMMONWEALTH OF VIRGINIA	)	
	)	
v.	)	CRIMINAL No. 102888
	)	
LEE BOYD MALVO	)	

COMMONWEALTH'S RESPONSE TO DEFENDANT'S MOTION TO SUPPRESS

I. The Court must look to the totality of the circumstances in determining whether Malvo knowingly and intelligently waived his rights.

Juveniles are entitled to waive their constitutional rights in the same manner as adults. Fare v. Michael C., 442 U.S. 707 (1979). In determining the validity of a juvenile's waiver of Sixth Amendment rights, the Court must examine the totality of the circumstances, and this determination is the same when a juvenile is involved. Green v. Commonwealth, 223 Va. 706,710 (1982). This test is the same one employed in connection with cases involving adult defendants. Smith v. Commonwealth, 7 Va. App. 310 (1988). The totality of the circumstances test requires the court to consider all of the facts and circumstances surrounding the defendant's interview with police. Under Grogg v. Commonwealth, the inquiry into the totality of the circumstances "includes evaluation of the juvenile's age, experience, education, background and intelligence, and whether he has the capacity to understand the warnings given him ... ..." 6 Va. App. 598, 612 (1988)

On the day of his interview with Fairfax authorities, Malvo was three months shy of his eighteenth birthday. The interview in question took place on November 7, 2002, and Malvo turned 18 years of age on February 18, 2003. In addition, the evidence will show that Malvo was relaxed and calm during the interview. Malvo, in his brief seeks to portray himself as a scared child whose will was overborne by the police. However, his demeanor during the interview demonstrates otherwise. It is not so much what he said, but rather, *how* he said it, that best illustrates who Malvo is. For example, Detective Boyle will testify that Malvo described an instance where he shot at a child and missed. Evidently, Malvo found it amusing that as the errant bullet flew past the boy's head he swatted at the air as if a bee had buzzed too close. Malvo actually smiled and chortled as he recounted this event. The point here is that Malvo was not the least bit intimidated by the police. In fact, the record in Maryland reveals that Malvo was unintimidated even by the Federal Magistrate Judge, as evidenced by Malvo's stony silence in the face of the Court's inquiries to him.

During the interview in Fairfax, Malvo spoke calmly and articulately about his crimes. He was not under the influence of drugs or alcohol. He was familiar with his Miranda rights having had them explained to him on several prior occasions. Moreover, Malvo is educated and intelligent. He reads and writes the English language. Some of his jailhouse writings reveal an interest in history, politics and religion. Furthermore, Malvo was familiar with his Miranda rights, having been informed of them in the past on several occasions. Finally, Detective Boyle asked him four times if he wanted to speak without a lawyer.

II. The Sixth Amendment is not activated by the service of a juvenile petition.

In a long line of decisions, the Supreme Court of the United States has steadfastly held that an individual's right to counsel under the Sixth Amendment attaches only after formal adversarial judicial proceedings have been commenced against him. See, e.g., Powell v. Alabama, 287 U.S. 45, 56-57 (1932) (where no defense attorney was effectively appointed until day of trial, the absence of one during the critical period between arraignment and trial violated the Sixth Amendment); Hamilton v. Alabama, 368 U.S. 52, 54 (1968) (Alabama arraignment is critical stage); Gideon v. Wainwright, 372 U.S. 335 (1963) (state felony trials); White v. Maryland, 373 U.S. 59 (1963) (Maryland preliminary hearing is critical stage); Massiah v. United States, 377 U.S. 201 (1964) (post-indictment interrogation); United States v. Wade, 388 U.S. 218 (1967) (post-indictment lineups); Brewer v. Williams, 430 U.S. 387, 399 (1977) (arrest, arraignment, and commitment to jail was enough to trigger Sixth Amendment rights); United States v. Gouveia et al., 467 U.S. 180, 190 (1984) (inmates placed in pretrial segregation have no right to counsel until initiation of adversarial proceedings, the Court has "never held that the right to counsel attaches at the time of arrest"). Significantly, important parts of the analysis in the foregoing opinions are the procedures of the particular states under scrutiny. No opinion has ever held that service of a juvenile petition under Virginia law would constitute a "critical stage" of the proceedings.

The purpose of the Sixth Amendment right to counsel is to protect the laymen when he is confronted by the "procedural system, or by his expert adversary, or by both." United States v. Ash, 413 U.S. 300, 310 (1973). While the protection of the

Sixth Amendment right to counsel has been expanded to cover certain pretrial proceedings, e.g., arraignments, preliminary hearings and post indictment live-body lineups, all of these events have been held to constitute "critical stages" of the process. The Supreme Court of the United States has never held that the right to counsel attaches at the time of arrest. See generally, Gouveia, 467 U.S. at 191. Rather, "the defendant has the right to the presence of an attorney during any interrogation occurring *after the first formal charging proceeding, the point at which the Sixth Amendment right to counsel initially attaches*." Moran v. Burbine, 475 U.S. 412, 428 (1986) (emphasis added).

Malvo's Sixth Amendment rights were not violated when Fairfax authorities interviewed him on November 7, 2002, because formal adversarial judicial proceedings had not yet been initiated with respect to the charges in Fairfax County. Although Malvo was under arrest on petitions obtained from the Fairfax County Juvenile Court at the time of the interview, an arrest does not mark the commencement of adversarial judicial proceedings, nor does it trigger the Sixth Amendment right to counsel. Kirby v. Illinois, 406 U.S. 682, 688, 689 (1972) (Sixth Amendment rights attach after initiation of formal judicial criminal proceedings); Hunter v. Commonwealth, 3 Va. App. 221, 225 (1986) (defendant's mere arrest was not a formal adversarial judicial proceeding which would entitle him to counsel at a subsequent lineup); Gouveia, supra. Therefore, Malvo's rights under the Sixth Amendment had not attached, and the police acted properly when they interviewed him on the night of November 7, 2002.

The facts as well as the legal issues presented in the case at bar are similar to those in Commonwealth v. Eaton, 240 Va. 236 (1990). In Eaton, the defendant was represented by counsel on unrelated charges of burglary and larceny in Shenandoah County. Subsequently on the afternoon of February 20, 1989, he began a horrific crime spree in Shenandoah County. First, he killed his roommate and a neighbor. Afterwards, he drove on the interstate highway until Master State Trooper Jerry L. Hines in Rockbridge County stopped him. He then shot the Trooper Hines to death. He and his girlfriend then fled that scene.

Soon they became involved in a high-speed chase with police. At some point during the chase, the defendant lost control of his car and crashed into a pole. Before police could reach him, the defendant shot and killed his girlfriend and attempted to take his own life with the same weapon. The defendant ultimately recovered from his self-inflicted gunshot wound and stood trial for capital murder.

Police first questioned the defendant on February 21, 1989 after he had medical treatment for his wound. They advised him of his of his Miranda rights. He invoked his right to remain silent by shaking his head from side to side when asked if he was willing to answer questions.

Several days later police officers from Rockbridge County interviewed the defendant at the Roanoke County jail where he was being held on the charge of murder in connection with the killing of his girlfriend. Before the officers interviewed the defendant, they visited with the Rockingham County Prosecutor among others. The prosecutor told the Rockbridge County Officers that the unrelated

burglary and larceny charges had been disposed of earlier that same day. In fact, they were nolle prossed shortly before the officers interviewed the defendant.

Before speaking to the defendant, the officers advised him of his Miranda rights. The defendant said little at that interview. Although two days later, on February 26, 1989, he called one of the officers and asked him to bring a picture of his dead girlfriend to the jail. The officer complied with the defendant's request and brought the photograph to him in the jail. When the officer gave the defendant the picture, he also advised him of his Miranda rights. At that point, the defendant admitted to shooting the girlfriend but claimed she was dead when he did so. He neither admitted nor denied murdering the Trooper.

On appeal, the defendant claimed a violation of his Sixth Amendment right to counsel because his court appointed attorney on the burglary and larceny charges in Rockingham County was not present at the November 24, 1989 interview.

The Court in Eaton, rejected the defendant's Sixth Amendment claim because "[His] Sixth Amendment right to counsel had not yet attached with respect to the murder of Trooper Hines because 'adversary judicial proceedings "had not yet been initiated on that charge." The Court relied upon Michigan v. Jackson, 475 U.S 625 (1986). Similarly, in the instant case Malvo's Sixth Amendment rights had not attached with respect to the Fairfax charges when he was interviewed on November 7, 2002, because formal adversary proceedings had not yet begun and his Sixth Amendment rights in Maryland expired when those charges were dismissed.

III. Malvo had no Sixth Amendment right to counsel based on charges in Virginia and his court appointed counsel in Maryland did not represent him on the criminal charges in Fairfax County.

Malvo relies upon an Order issued by Magistrate Judge Bredar (Defendant's Exhibit 6) for the proposition that his court-appointed Maryland attorneys continued to represent him on the Fairfax County charges. His reliance on this Order is misplaced for several reasons. First, Magistrate Judge Bredar's Order purports to continue the appointment of Malvo's several lawyers, as well as Muhammad's, "so long as they are in circumstances where they are entitled to appointment of counsel under the Sixth Amendment to the Constitution." As a matter of law, once the charges against Malvo were dismissed in Maryland, his Sixth Amendment right to counsel was extinguished. Therefore, since Malvo was not entitled to counsel with respect to the Fairfax charges under the Sixth Amendment, Malvo's claim that Magistrate Judge Bredar's Order continued the appointment of Maryland counsel is fatally flawed.

Magistrate Judge Bredar's Order specifically states as follows:

> ... to the extent that there are *parallel proceedings in state court relating to the same matters that have been the subject of your representation in the federal proceedings*, then, until such time as other competent counsel have assumed responsibility for the representation of your clients, you should treat those state matters as 'ancillary matters' within the meaning of 18 U.S.C. § 3006 A (c)" (emphasis supplied).

Initially, Magistrate Judge Bredar appointed counsel to represent Malvo with respect to his detention on a Federal Material Witness Warrant (Defendant's Exhibit 2). This charge was entirely different from the Fairfax charges and in no way constituted a parallel proceeding. Upon the dismissal of the Material Witness

Warrant, counsel was re-appointed to represent Malvo on Federal charges which alleged violations of 18 U.S.C. § 371, 1951 & 1952. Again, these Federal charges were different from the Fairfax County charges. The Fairfax killing of Linda Franklin was not a subject of this 20 Count Federal Information. Certainly, this Federal Information was not in any sense "parallel to" or even related to the Fairfax County charges. Therefore, a close reading of the language of Magistrate Judge Bredar's Order shows it did not operate to appoint counsel to represent Malvo on his Fairfax charges. While Magistrate Judge Bredar's Order of November 7, 2002 referenced "parallel Proceedings in state court" and advised former counsel to treat any such proceedings as "ancillary matters," in no way can the can the charges in Fairfax County be construed as either "ancillary" or "parallel" to either the Federal Material Witness Warrant, or the Federal Information alleging a violation of the Hobbes Act.

Presumably, when Magistrate Judge Bredar referred in his Order to "parallel proceedings in state court," he meant state courts in Maryland. Additionally, in order to represent a defendant in the Courts of this Commonwealth counsel must be a member of the Virginia State Bar. Va. Code § 54.1-3904. None of Malvo's court-appointed Maryland lawyers or guardians were licensed to practice law in Virginia in November of 2002. Therefore, none of them were eligible to be appointed as counsel on the Virginia charges, especially not by a Maryland Magistrate Judge.

However, even assuming *arguendo* that Magistrate Bredar took it upon himself to attempt to appoint Maryland counsel to represent Malvo in Virginia, his order to this effect is *void ab initio.* Federal Magistrate Judges are not provided for

under U.S. Const. Art. III. They are purely creatures of statute. Therefore, the authority of the Magistrate Judge is strictly limited to that provided for by statute. A Magistrate Judge sitting in a Maryland Federal Court is without any power or authority whatsoever to exercise any jurisdiction over state criminal proceedings in a foreign state. See generally, 28 U.S.C § 636 (a) (Magistrate Judges may only exercise their powers and duties within the territorial prescribed by their appointment). Even assuming, respectfully, that the Magistrate Judge believed his powers so expansive as to encompass the right to appoint counsel to criminal cases in foreign states, his attempt to exercise such power fails completely in the face of his limited jurisdiction.

IV. Virginia authorities did not violate Malvo's rights under Va. Code §16.1-247.

Va. Code § 16.1-247 does not contain any provision prohibiting law enforcement officers from interviewing a juvenile with respect to the criminal allegations against him before taking him to intake officers for processing. The Code merely requires that the person taking the child into custody to bring him to an intake officer in the "most expeditious manner practicable."

The timing of the surrender of the juvenile to intake officers is necessarily going to be influenced by the peculiar facts and circumstances in each case. In the instant case, Malvo indicated he wanted something to eat. He did not request the usual fare of hamburgers or pizza, both of which are readily available. Instead, he wanted veggie burgers. Malvo's request resulted in a delay of approximately one hour as the authorities sought to fulfill Malvo's desire for a healthful meal. Once the

food was obtained and delivered to him, Malvo ate both veggie burgers and drank water while his interviewers waited. This took an additional 30 minutes.

Malvo was relaxed and loquacious, as he spoke generally about a variety of ordinary topics. It must be stated that because of the extraordinary number of victims in this case, and the different locations involved, the interview was perhaps longer than would have been the case had there been fewer victims or less complexity to the cases. At approximately 8:35 p.m., Detective Boyle asked Malvo if he wanted to continue talking and he stated he did. In any event, this was not a situation where the defendant had expressed any reluctance to speak about the crimes.

After Malvo had eaten and the small talk was finished, he got right down to discussing the killings. His demeanor was calm and relaxed. At times during the interview, Malvo laughed or smiled. For example, he laughed as he described shooting the woman at Home Depot in the head. He never expressed or exhibited any fearfulness or nervousness.

As events unfolded on the night of November 7, 2002, the intake officer at the Juvenile Detention Center concluded that given the nature of the allegations as well as Malvo's attempt to escape from custody in Maryland, that Malvo was a threat to the safety of the other juveniles and staff at the facility. The Director of the Juvenile Detention Center contacted Judge Maxfield at home and the Judge ordered Malvo held in the Adult Detention Center separate from adult inmates pursuant to Va. Code § 16.1-249.

Later Malvo would unsuccessfully challenge Judge Maxfield's Order that he be confined in a separate area in the Adult Detention Center.

Regardless, even assuming for the purposes of argument, that the police ran afoul of Va. Code § 16.1-247, that section "is not intended to safeguard a juvenile's Fifth and Sixth Amendment rights." Roberts v. Commonwealth, 18 Va. App. 554 (1994). Moreover, mere technical violations of procedural statutes such as the one at issue do not give rise to the application of the exclusionary rule. Durrette v. Commonwealth, 201 Va. 735 (1960), Frye v. Commonwealth, 231 Va. 370 (1986). Mere, non-compliance with Va. Code §16.1 -247 does not prove the Commonwealth failed to meet its burden of proof with respect to the defendant's waiver of his right to silence or counsel. Roberts, 18 Va. App. at 558.

Malvo's contention that the actions of the Commonwealth in this case were "actually and effectively designed to circumvent Mr. Malvo's right to have counsel present," are simply not accurate. The Commonwealth was not apprised that Malvo was available to be transported to Virginia until the afternoon of November 7, 2002. Neither the Commonwealth, nor its agents, had any input whatsoever in the disposition of the Federal charges against Malvo in Maryland. When Fairfax County authorities were informed that Malvo was ready to go to Virginia, they simply arranged to pick him up. When they brought him to Fairfax, they read him his rights and asked him if he'd speak to them. This is exactly what they would have done in any other case. There was no plan to deprive defendant of any rights. To the contrary, he was accorded all of his rights here in Fairfax County. He was treated no better and no worse than any other defendant.

Brewer v. Williams, 430 U.S. 387 (1977), which Malvo cites in support of his Motion to Suppress is inapposite to the facts here. In Brewer, the defendant had been

arraigned and appointed an attorney on the charge at issue. While he was being transported by car from one location to another, a police officer made the infamous "Christian burial speech" which resulted in the defendant's making incriminating admissions. Furthermore, the police were aware that the mentally ill defendant had a peculiar susceptibility to appeals to his religious nature. The police preyed upon that weakness by engaging in the functional equivalent of interrogation even though they knew formal judicial proceedings, by way of arraignment, had begun, and further that defendant had been appointed counsel.

The facts of the instant case could not be more remote from those in Brewer. In the present case, Malvo had no attorney on the Virginia charges. He wasn't appointed an attorney until November 8, 2002. He had not been arraigned on the Virginia charges at the time police in Fairfax interviewed him. He was not mentally ill, nor did he have any peculiar susceptibilities to particular types of questioning, as far as the police were aware. He had met with counsel on his unrelated Maryland charges as is borne out in the transcripts of the Maryland proceedings. If nothing else, it is clear that Malvo was not afraid to remain silent when he wanted to as evidenced by his brazen refusal to speak at all when spoken to by the Magistrate Judge in Maryland.

Before he waived his rights in Fairfax, Malvo noted that his Maryland lawyers had told him not to say anything. He was clearly cognizant of his right to remain silent, as well as his right to counsel. He was advised by Fairfax County Detectives of his Miranda rights. They even asked Malvo if he was sure he wanted to make a statement even though he had already agreed to do so. Malvo voluntarily

decided to make a statement without any promises or threats, though he told police that he would answer only those questions that he wished to answer. This full exercise of his constitutional privileges demonstrates his clear understanding of his rights and is perhaps the best evidence of his knowing and intelligent waiver.

V. Malvo's Sixth Amendment rights were not violated when police interviewed him in Fairfax County.

Up to and including November 7, 2002, Malvo never once personally invoked his right to counsel with respect to the Fairfax charges in Fairfax County. He did not invoke the right to counsel in the Fifth Amendment context of Miranda; nor had his Sixth Amendment right to counsel attached in the Fairfax cases by virtue of the fact he had not yet faced formal proceedings on them. Regardless, he never asked the Magistrate Judge in Maryland to appoint him an attorney, although the Magistrate Judge appointed him three, and two guardians on the Maryland Federal charges. A review of the federal transcripts from Maryland reveals that Malvo refused to answer the simplest questions posed by the Court. He literally remained mute refusing to acknowledge his identity or his age. At no time did Malvo ever express a desire to deal with the police through counsel in the context of Miranda.

The facts and holding of Texas v. Cobb, 532 U.S. 162 (2001), are particularly applicable to the instant case. Cobb, held that Sixth Amendment rights are offense specific. Id. at 173. The facts in Cobb although gruesome, are relevant here. The defendant in Cobb, was initially arrested on an unrelated charge. While incarcerated on the unrelated charge, he confessed to a burglary, but denied any knowledge of the whereabouts of a woman and baby who were missing from the house which he

admitted to burglarizing. Later he was indicted on the same burglary. While he was in custody on the burglary and after he had an attorney appointed to represent him on that charge, the police approached him in jail and advised him of his Miranda rights. The defendant then waived his Miranda rights and confessed to killing the woman, and burying her in a grave. He further claimed that the child had fallen into the grave with the woman, so he buried them both. The defendant claimed that because he had been appointed counsel on the "factually related" burglary, the police were barred from questioning him on the murders.

The Supreme Court of the United States in Cobb, emphatically rejected the defendant's contention in this respect and held as follows: "We hold that our decision in McNeil v. Wisconsin, 501 U.S. 171 (1991), meant what it said, and that the Sixth Amendment right is 'offense specific.'" Cobb, 532 U.S. at 164. Quoting from McNeil, Id. at 175, the Cobb Court reaffirmed that "the Sixth Amendment righ[t] [to counsel]... is offense specific. It cannot be invoked once for all future prosecutions, for it does not attach until a prosecution has commenced, that is, at or after the initiation of adversary judicial criminal proceedings..." Cobb, 532 U.S. at 167.

Malvo's claim that his former Maryland attorneys could invoke his Sixth Amendment right to counsel for him on the Virginia charges is erroneous. A defendant's Sixth Amendment rights are his personal rights; they may not be invoked vicariously by his attorneys on his behalf. Lamb v. Commonwealth, 217 Va. 307 (1976). In Lamb, the defendant's attorney arranged for the defendant to turn himself in and told the police and prosecutor not to question him. Moreover, the defendant's attorney advised the defendant, in front of the police officers, not to say anything.

Despite these admonitions and after being advised of his Miranda rights, the defendant made incriminating statements. The statements were held not to have been taken in violation of the Sixth Amendment inasmuch as the right to counsel "is the defendant's right and not the right of his counsel." Lamb, 217 Va. at 310.

Again, Malvo's reliance on Brewer v. Williams in the context of his argument that his Sixth Amendment rights were violated is misplaced. The facts in Brewer are completely opposite from those here. First, there was no agreement by Fairfax County police or anyone to refrain from interviewing Malvo. There was such an agreement in Brewer. Second, Malvo was not represented by any attorney on the Fairfax charges when he was brought to Virginia. The defendant in Brewer had an attorney appointed on the very charges about which he was interrogated. Third, formal adversary judicial proceedings had not been commenced against Malvo here in Fairfax, so his Sixth Amendment right with respect to the new charges hadn't attached. The defendant in Brewer had been arraigned and appointed an attorney on the charges about which he was questioned by police.

In addition, Malvo never invoked his right to an attorney in the context of Miranda. It must be emphasized that Sixth Amendment rights don't travel with the defendant; they are charge specific. Eaton v. Commonwealth, 240 Va. 236 (1990); Cherrix v. Commonwealth, 257 Va. 292 (1999).

VI. Malvo never requested an attorney during his interview with Detective Boyle and Special Agent Garrett.

Malvo did not request an attorney either before or during the interview with Detective Boyle and Special Agent Garrett. Malvo's question, "Do I get to see my attorneys?" was not a request for counsel. Likewise, Malvo's statement that "my attorneys told me not to say anything to the cops until they got there" was not a request for counsel.

Malvo's inquiry, "Do I get to see my attorneys?" is literally not a *request,* rather it is a question. In Akers v. Commonwealth, 216 Va. 40 (1975), the defendant, while under arrest for homicide, and during custodial interrogation stated, "Do I have to talk about it now?" In response, one of the police officers said, "Well, we would just like to get it all straightened out now." A second officer chimed in and said, "Tell it all right now. It'll do you good to get it out." The Court in Akers, held defendant's subsequent admissions were admissible because he did not invoke his right to counsel. The Court noted, "Defendant's inquiry was no more than an impatient gesture on his part." If defendant had desired to end the interrogation, he could have simply said, "I do not want to answer any more questions." Akers 216 Va. at 46, citing State v. Nichols, 212 Kan. 814 (1973). Similarly, in the instant case, had Malvo desired to either remain silent, or have an attorney, he could have simply said so. However, he did not. It should be remembered here that Malvo was fully advised of his Miranda rights and waived them before discussing the crime.

In Edwards v. Arizona, 451 U.S.477 (1981), the Court held that the police must scrupulously honor the defendant's request for the assistance of counsel. However, Edwards did not imbue the word "attorney" with magical powers, whereby

upon its mere utterance the police must cease all communication with the defendant regardless of the context of the conversation.

In Davis v. United States, 512 U.S. 452 (1994), the Supreme Court held that where an accused makes an ambiguous or equivocal statement with regard to his desire for the assistance of counsel, such that a reasonable officer under the circumstances would have understood only that the defendant *might* be invoking the right to counsel, Edwards does not require that officers stop questioning the suspect. The Court reasoned that to extend Edwards to require the police to cease questioning subjects who make ambiguous or equivocal references with reference to counsel would turn the Miranda safeguards into wholly irrational obstacles to legitimate investigative activity. Id. at 453. The Court characterized its holding as a "bright line" rule, which would be easily understood and applied by police officers. In that context the court also held that the police are not required to ask clarifying questions when a suspect makes an ambiguous statement with regard to his desire for counsel. Id. at 456-462.

In Eaton v. Commonwealth, 240 Va. 236 (1990) the Supreme Court of Virginia held that the statement, "*You did say I could have any attorney if I wanted one?*" did not constitute a request for counsel.

In Poyner v. Commonwealth, 229 Va. 401 (1985), the defendant said, "*Didn't you tell me that I had the right to an attorney?*" The police officer replied, "*Yes, you do have the right to an attorney.*" At that point, the defendant made a confession. The Court in Poyner, held that defendant's statement was at best a request for clarification of his rights, and further that "**the police did all they were**

required to do when they answered 'yes' to his question." Id. at 410. Applying the rule in Poyner, to the instant case, Detective Boyle did all she was required to do when she answered "yes" to Malvo's inquiry. However, Detective Boyle did more than answer "yes"; she also explained to Malvo that he was facing new charges in Virginia.

Malvo's assertion in his brief that Detective Boyle "lied" to him when she answered "yes" to his inquiry regarding counsel is an unfortunate and unwarranted calumny. In the context of the conversation, her answer was appropriate and accurate.

VII. Malvo's waiver of his Miranda rights effectively constituted a waiver of any Sixth Amendment right to counsel.

Even a defendant who has already been indicted may waive his Sixth Amendment right to counsel provided the waiver is knowing, voluntary and intelligent. Patterson v. Illinois, 487 U.S. 285 (1988). Patterson held that an accused's post-indictment waiver of his Sixth Amendment right to an attorney is knowing and voluntary if he has simply been advised of his Miranda rights and waives them. Id. at 297- 300. The Court in Patterson specifically rejected the notion that Sixth Amendment rights are somehow more difficult to waive than Fifth Amendment rights. Id. at 297-300.

In the instant case, the police advised Malvo of his Miranda rights and he waived them. Even if this Court was to find that Malvo's Sixth Amendment rights had attached with respect to the Fairfax charges, it is clear that he knowingly, intelligently and voluntarily waived them under Patterson.

Scattered throughout his brief, Malvo advances several arguments as to why the Court should ignore his otherwise obvious waiver of Sixth Amendment rights. For instance, Malvo claims that while he was waiving his Sixth Amendment rights those rights were nevertheless being vicariously invoked by Mr. Petit. As a purely factual matter, on the night of November 7, 2002, Todd Petit had not yet been appointed guardian for Malvo. Mr. Petit was not appointed to be Malvo's guardian until the next day, November 8, 2002. (See Order in this case entered by Judge Maxfield). Thus, Mr. Petit had no status in the case on November 7, 2002, and his curious efforts to visit Malvo on the night before the Juvenile Court Judge appointed him are in any event irrelevant to the issue of Malvo's waiver. The Sixth Amendment right to counsel is a personal right, which Malvo alone could choose to invoke or waive. Lamb, 217 Va. at 310. The police were under no legal duty to interrupt Malvo's interview in order to inform him of Mr. Petit's presence. Moran v. Burbine, 475 U.S. 412 (1986), ("events occurring outside suspect's presence and entirely unknown to him can have no legal bearing on the capacity to comprehend and knowingly relinquish a constitutional right"); see also Jackson v. Commonwealth, 225 Va. 625 (1998).

Malvo also urges the Court to disregard his waiver because he was not informed of the nature of the charges in Fairfax County. This claim is belied by the Miranda form itself. On that Miranda form, Detective Boyle wrote "homicide" in the appropriate space. This Miranda form was read to Malvo and he read it himself. Perhaps the best evidence that Malvo knew what charges he faced in Fairfax County

is the fact that after he waived his rights he freely discussed the murder of Linda Franklin at the Home Depot in a lighthearted manner.

Malvo also complains that the Detectives failed to inform him about charges pending against him in other jurisdictions. The police were not required to inform Malvo of all of the subjects which might be discussed during his custodial interrogation. Colorado v. Spring, 479 U.S.564 (1987); North Carolina v. Butler, 441 U.S. 369 (1979); Shell v. Commonwealth, 11 Va. App. 247 (1990).

A defendant's refusal to sign his name to the Miranda form does not invalidate his waiver. North Carolina v. Butler, 441 U.S. 369 (1979). There is no requirement that a defendant's waiver be in writing. Frye v. Commonwealth, 231 Va. 370 (1986). Nor is a refusal to sign a waiver form an invocation of a defendant's right to silence. (See Mitchell v. Commonwealth, 30 Va. App. 520 (1999). While Malvo declined to sign his name to the Miranda form, he did affix his mark to it. Malvo's "X" on the form serves as strong evidence of his knowing and voluntary waiver. Malvo's mark on the Miranda rights form, combined with his oral assent to waive his rights provides overwhelming evidence of his knowing, voluntary and intelligent waiver.

Malvo's statement that he did not want to sign the Miranda form because it might be incriminating was not intended to evince an unwillingness to speak to investigators. Rather, Malvo was referring to the possibility that his handwriting itself might be incriminating. This interpretation is corroborated by the fact that Malvo also signed his fingerprint cards in Fairfax with an "X." Several handwritten extortion notes were recovered by police in connection with this case, so Malvo's

concern about providing an example of his handwriting was rational and in no way constituted an attempt to invoke his rights.

His reluctance to sign his name was a clear manifestation of Malvo's understanding that he did not have to answer questions or respond to police requests. This becomes particularly clear when considered in light of Malvo's oral statements that he would answer some questions and not others. Put another way, Malvo's conduct and statements with regard to the signing of the form and the answering of limited questions is perhaps the best evidence of his knowing, voluntary and intelligent waiver of his rights. Under the circumstances, he obviously felt free to decide for himself how he would respond to police questions and requests.

Malvo erroneously characterizes the presence of a parent or guardian at an interrogation as a "right" which was not fully explained to him. Malvo did not enjoy a "right" to the presence of a parent or guardian at a custodial interrogation. Wright v. Commonwealth, 245 Va. 177 (1993), Grogg v. Commonwealth, 6 Va. App. 598 (1988). The presence or absence of a parent or guardian, is simply one factor to be considered in the "totality of circumstances" surrounding a juvenile's waiver of rights. Grogg 6 Va. App. at 613.

VIII. Malvo's claim that he could not have waived his Sixth Amendment rights with respect to the Fairfax charges because the Sixth Amendment is offense specific is without merit.

Malvo did not invoke his Fifth Amendment right to counsel during any of the proceedings against him in Federal Court. The transcripts of those proceedings reveal no statement by Malvo that could in any way be interpreted as an invocation by him

of his Fifth Amendment right to counsel. Indeed, Malvo remained mute and completely non-communicative throughout the course of the Federal hearings in Maryland. He refused to acknowledge his identity, age or any other inquiry directed to him by the Court or Counsel.

Malvo claims that his former Maryland counsel, Mr. Tucker, explicitly invoked his Fifth Amendment right to counsel "as he was being transported from jurisdiction to jurisdiction en route to Fairfax," Motion to Suppress at page 23. The case of Moran v. Burbine, 475 U.S. at 422, is dispositive of this claim. In that opinion the Court ruled that, "events occurring outside the presence of the suspect and entirely unknown to him surely can have no bearing on his capacity to comprehend and knowingly relinquish a constitutional right."

Malvo's reliance on Williams v. Brewer, 430 U.S. 387 (1977), is misplaced in the Fifth Amendment context in which he uses it. The decision in Brewer turned on an analysis of the Sixth Amendment, not the Fifth Amendment. Id. at 397. The defendant in Brewer had been arrested, arraigned, and appointed counsel on the specific charges that detectives later interrogated him about in the absence of his attorney. Furthermore, Malvo's claim that defendant's right to counsel was "vicariously invoked" in Brewer is erroneous. The defendant himself in Brewer told the police that he would only talk to them after he met with his attorney. Id. at 392, 405. Brewer simply does not hold that an attorney may vicariously invoke a defendant's rights.

Malvo's assertion that he did not waive his Fifth Amendment rights when he was approached and questioned by law enforcement authorities in Maryland may be

accurate. However, Malvo did not invoke his Fifth Amendment right to counsel. Instead, he merely stood silent, thus exercising his Fifth Amendment right to remain silent. The case of Arizona v. Roberson, 486 U.S. 675 (1988), is therefore inapt. In Roberson, the defendant did more than invoke his right to remain silent, he actually said he "wanted a lawyer before answering any questions," thereby triggering his right to counsel under the Fifth Amendment.

The distinction between the Fifth Amendment right to remain silent and the Fifth Amendment right to counsel is an important one. Where a defendant invokes his Fifth Amendment right to counsel, the police may not re-approach him unless he initiates the contact and validly waives his rights. In the case where a defendant merely invokes his Fifth Amendment right to remain silent, the police are given more leeway with respect to their ability to re-approach the defendant. In Michigan v. Mosely, 423 U.S. 96 (1975), the defendant was arrested for two robberies. The first occurred at the Blue Goose Bar, and the second happened at the White Tower Restaurant. Upon his arrest the defendant was advised of his Miranda rights and said he didn't want to answer any questions. The officer stopped questioning the defendant at that point. However, two hours later a second officer approached the defendant at the jail, re-advised him of his Miranda rights, and questioned him about an unrelated murder. In upholding the validity of the second interrogation, the Court noted that the defendant's rights had been scrupulously honored; the second interview involved a different offense; a different interviewer; the lapse of a significant period of time, two hours, and fresh Miranda warnings.

In the instant case, Malvo refused to give verbal answers when he was approached by Montgomery County police after his arrest and advised of his Miranda rights. While Malvo made no verbal responses to the Montgomery County detective, he did communicate by making hand gestures. Eventually, the detective gave up trying to communicate with Malvo when it became clear that Malvo would only communicate by hand signal, and the detective could not understand these gestures. Malvo did make it clear by shaking his head that, at a minimum, he did not want to verbalize his responses to the detective. At that point, Malvo was under arrest on the Federal Material Witness Warrant.

The interview with Fairfax authorities on November 7, 2002, involved different charges, different detectives, the passage of two weeks and a fresh explanation of Malvo's Miranda rights. Therefore, even if Malvo's odd behavior in the presence of the Montgomery detective may be construed as an invocation of his right to silence, the Mosely test has clearly been satisfied and Malvo's waiver on November 7, 2002, was valid.

The claim at page 24 of the Motion to Suppress with respect to a "position and understanding" between a number of Maryland attorneys and the Magistrate Judge is truly puzzling. The assertion that anyone enjoyed an "understanding" with Malvo is absurd in light of the clear record that Malvo communicated with no one. Indeed, when Malvo finally did speak in Fairfax, he managed to converse for several hours with detectives without once referencing any of the supposed legal understandings he had with any of the Maryland lawyers, guardians or the Magistrate Judge. In any event, no authority in Fairfax County was contacted by any of Malvo's former

lawyers in connection with this case prior to the interview on November 7, 2002. It was the understanding of all law enforcement personnel on November 7, 2002, that Malvo did not have counsel and further that counsel would likely be appointed the next morning. This is, in fact, what actually happened.

Finally, the Commonwealth fails to see the relevance of Malvo's former attorney's public comments in response to the alleged comments of a Maryland state prosecutor, which are referenced at page 24 of the Motion to Suppress. These events simply have no bearing on the matters at hand.

IX. Malvo did not clearly unambiguously and unequivocally invoke his right to counsel during the November 7, 2002, interview.

Preliminarily, it is important for the Court to recognize and reject the unsupported assertion by Malvo on page 27 of his Motion to Suppress that he enjoys a "lower burden to let detectives know that he wanted to meet with counsel." The sole rationale behind this assertion is that by dint of his extensive dealings with other defense lawyers, on other criminal matters, he was somehow relieved of the obligation to make a clear and unambiguous request for a lawyer if he desired one. The public policy considerations against the adoption of such a rule are manifestly obvious. It would mean that the most experienced criminals, those most entangled in multiple crimes, would actually be afforded more rights than a criminal novice. Such a result offends principles of equal treatment under law for persons similarly situated.

Malvo did not request an attorney either before or during the interview with Detective Boyle and Special Agent Garrett. Malvo's question, "Do I get to see my

attorneys?" was not a request for counsel. Likewise, Malvo's statement that "my attorneys told me not to say anything to the cops until they got there," was not a request for counsel or an expression of his desire to remain silent. At best it was an expression of some reservation in Malvo's mind that he elected to reject by waiving his rights. Malvo's statement is analogous to the defendant's statement under scrutiny in Midkiff v. Commonwealth, 250 Va.262 (1995). In Midkiff, the Court held "the defendant's statement, 'I'm scared to say anything without talking to a lawyer,' did not constitute a request for an attorney. The Midkiff Court opined that the defendant's statement "expresses his reservation about the wisdom of continuing the interrogation without consulting a lawyer; however it does not clearly and unambiguously communicate a desire to invoke his right to counsel."

In Edwards v. Arizona, 451 U.S. 477 (1981), the Court held that the police must scrupulously honor the defendant's request for the assistance of counsel. However, Edwards did not imbue the word "attorney" with magical powers, whereby upon its mere utterance the police must cease all communication with the defendant regardless of the context of the conversation.

In Davis v. United States, 512 U.S. 452 (1994), the Supreme Court held that where an accused makes an ambiguous or equivocal statement with regard to his desire for the assistance of counsel, such that a reasonable officer under the circumstances would have understood only that the defendant *might* be invoking the right to counsel, Edwards does not require that officers stop questioning the suspect. The Court reasoned that to extend Edwards to require the police to cease questioning subjects who make ambiguous or equivocal references with reference to counsel

would turn the Miranda safeguards into wholly irrational obstacles to legitimate investigative activity. Id. at 453. The Court characterized its holding as a "bright line" rule which would be easily understood and applied by police officers. Additionally, the court also held that the police are not required to ask clarifying questions when a suspect makes an ambiguous statement with regard to his desire for counsel. Id. at 456-462.

The Supreme Court of Virginia likewise held that the police are not required to terminate an interrogation unless the suspect makes a clear and unequivocal request for counsel. Commonwealth v. Midkiff, 262 Va. 262, 266 (1995). In Midkiff, the statement under scrutiny was, "I'll be honest with you; I'm scared to say anything without a lawyer." The Court found that this statement fell short of a clear and unequivocal invocation of either the defendant's right to an attorney or his right to remain silent. Id. at 267. Moreover, Midkiff, adopted the rule in Davis, and held that the police are not required to ask clarifying questions. Id. at 266.

Malvo's inquiry, "Do I get to see my attorneys", did not constitute a clear and unambiguous request for counsel. Statements which have been considered by the higher Courts and found to be unclear, ambiguous or equivocal follow. See Mueller v. Commonwealth, 244 Va. 386, 396 (1992) ("Do you think I need an attorney here?"); Eaton v. Commonwealth, 240 Va. 236 (1990) ("You did say I could have any attorney if I wanted one?"); Poyner v. Commonwealth, 229 Va. 401 (1985) ("Didn't you tell me that I had the right to an attorney?"); Commonwealth v. Redmond, 264 Va. 301 (2002) ("Can I speak to a lawyer?"; "I can't even talk to a lawyer before I make any kinds of comments or anything?"); Burkettt v. Angelone,

208 F. 3d 172, 197-198 (4th Cir. 2000) (" I think I need a lawyer"); U.S. v. Posada-Rios, 158 F. 3d 832, 867 (5th Cir. (1998) ("might have to get a lawyer then, huh?"); Dormire v. Wilkinson, 249 F.3d 801, 805 (8th Cir. 2001) ("could I call my lawyer?"); U.S. v. Doe, 170 F. 3d 1162, 1166 (9th Cir. 1999) ("What time will I see a lawyer?") U.S v. Zamora, 222 F. 3d, 756, 766 (10th Cir. 2000) ("I might want to talk to an attorney.")

Malvo's attempt to distinguish the overwhelming authority against his position that he requested an attorney by emphasizing his use of the word "my" in his statement, "Do I get to see my attorneys?" is ineffective. The defendant's use of the word "my" as opposed to "an" attorney can be succinctly described as a case of a distinction without a difference. The burden is on the defendant to clearly and unambiguously state his desire for an attorney. This Malvo failed to do.

In U.S. v. Zamora, 222 F.3d 756 (10th Cir. 2000), the Court considered the testimony of an FBI agent who stated that the defendant after receipt of his Miranda warnings said, "... I might want to talk to my attorney." Id. at 765. The Court in Zamora held that this statement did not constitute a clear and unequivocal request for counsel. Id. at 766.

Whether or not Malvo believed he was still represented by his former Maryland attorneys is of little consequence under either a Fifth or Sixth Amendment analysis. Under the Sixth Amendment analysis, the question is whether or not the defendant is facing the commencement of formal adversarial proceedings. With respect to the Fifth Amendment analysis, the question is, did the defendant clearly and unequivocally invoke either his right to counsel or silence? In either case, on the

facts in the instant case, referenced herein and to be expanded upon the hearing of his Motion to Suppress, Malvo fails to establish his claim that his rights were violated.

X. Malvo's waiver of Fifth Amendment rights was voluntary.

The Commonwealth's burden with respect to proof of the voluntary nature of a confession is fairly low; "by a preponderance of the evidence." Grogg v. Commonwealth, 220 Va. 46 (1979). While the Court makes an initial legal determination, the jury is entitled to decide how much weight to apply to a defendant's statement in light of all the evidence. See Cherrix v. Commonwealth, 257 Va. 292 (1999).

The Commonwealth has a "heavy burden" to show a knowing and voluntary waiver of a Defendant's Fifth Amendment rights. Connecticut v. Barrett, 479 U.S. 523 (1987). While not required under the Constitution, a written waiver is "strong proof"' of a waiver. Mitchell v. Commonwealth, 30 Va. App. 520 (1999). Moreover, the defendant's willingness to speak after being advised of his Miranda rights is "highly probative" of voluntariness. Oregon v. Elstead, 470 U.S. at 319.

The fact that some might find a defendant's decision to waive "illogical" is irrelevant to the question of whether the waiver was knowing and voluntary. Barrett, 479 U.S. 564, citing Colorado v. Spring, 479 U.S. 564 (1987). In Spring, the Court noted, "we have never embraced the theory that a defendant's ignorance of the full consequences of his decisions vitiates their voluntariness." Id. at 576-577.

XI. Malvo's statements to Boyle and Garrett should not be suppressed as "fruits of the Poisonous tree."

First, in order for the doctrine of the "fruit of the poisonous tree" to apply, the tree itself, must have been poisonous. Spring, 479 U.S. at 571-572. Malvo claims that the tree was poisoned by his casual conversation with Special Agent Garrett and Detective Boyle in the span of time before he was advised of his rights. This contention is not supported by the facts surrounding the events of the evening in question. It must be kept in mind that the police were solicitous of Malvo when they spoke to him. For instance, he wanted veggie burgers and they arranged to have this food brought to him. It took an hour to get this meal to Malvo since veggie burgers, perhaps thankfully, are not a readily available food item. Once the food arrived, Boyle and Garrett let Malvo eat it before speaking to him about the case.

Naturally, there was small talk between Malvo and the investigators during this period and before they questioned him about the crimes. This was not interrogation. No objective observer could have viewed the officer's words or actions as designed to elicit an incriminating response. Blaine v. Commonwealth, 7 Va. App. 10 (1988); Jenkins v. Commonwealth, 224 Va. 445 (1992) ("police do not interrogate a suspect simply by hoping he will incriminate himself).

There was simply no coercive behavior or misconduct of any nature whatsoever on the part of Boyle or Garrett. In addition, no psychological ploys or deceptions were used in order to attempt to induce Malvo to speak. The investigators merely fed Malvo, made conversation and then read him his Miranda rights.

On the other hand, if the Court finds that Special Agent Garrett, might have advised Malvo of his Miranda rights, sooner, particularly when the conversation,

although, generally rambling in nature, turned to subjects close to the matters about which they wished to inquire, the case of Oregon v. Elstead, 470 U.S. 298 (1985) governs.

In Elstead, a police officer arrested the defendant on a charge of burglary. Before administering the Miranda rights, the officer interrogated him as to his involvement in the crime. The defendant confessed, and later confessed a second time after the police had advised him of his Miranda rights. Elstead, held that "the Fifth Amendment does not require suppression of a confession, made after proper Miranda warnings and a valid waiver of rights, solely because the police had obtained an earlier voluntary but unwarned admission from the suspect." Id. at 303-318. While the unwarned statement was inadmissible, the Court saw no reason to invoke the "fruits of the poisonous tree" doctrine as to the second confession. Id. at 304-309.

The Court in Elstead, explicitly rejected the "cat out of the bag" argument advanced by Malvo here.

> "Endowing the psychological effects of voluntary unwarned admissions ... such as the psychological impact of the suspect's conviction that he has 'let the cat out of the bag'... with constitutional implications, would practically speaking, disable the police from obtaining the suspect's informed cooperation, even when the official coercion proscribed by the Fifth Amendment played no part in either his warned or unwarned confessions." Id. at 309- 314.

Malvo's claim that Dickerson v. U. S., 530 U.S.428 (2000), overruled Elstead, is groundless. In fact, Dickerson cited Elstead, with approval and reaffirmed its holding. Dickerson, Id. at 441. Elstead remains good law and controls the issue presented here.

Under any analysis of the facts here, Malvo was not pressured, coerced, or tricked into making a statement to police. He made his statement voluntarily and

willingly. It was never the intention of Detective Boyle nor Special Agent Garrett, to violate Malvo's rights or to otherwise exercise any compulsion against him. Therefore, Malvo's post- Miranda statement is admissible in evidence in this case.

XII. Malvo's rights under the Vienna Convention were honored.

Malvo was advised of his rights pursuant to the Vienna Convention by Detective Boyle. Malvo's assertions in support of his position regarding are misleading at best. Both the law and the facts are squarely against him on this issue.

Even if the police hadn't informed Malvo of his rights under the Vienna Convention he has no remedy within the context of this criminal case. Bell v. Commonwealth, 264 Va. 172, 187-188 (2002); Shackleford v. Commonwealth, 260 Va. 196, 207 (2001); Kasi v. Commonwealth, 256 Va. 407, 419 (1999).

Respectfully submitted,

RAYMOND F. MORROGH
Deputy Commonwealth's Attorney

CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing Response to Defendant's Motion to Suppress was mailed, postage prepaid, to Michael Arif, Counsel for Defendant, 8001 Braddock Road, # 105, Springfield, Virginia 22151 and Craig Cooley, Counsel for the Defendant, 3000 Idlewood Avenue, P.O. Box 7268, Richmond, Virginia 23221 this 18th day of April, 2003.

RAYMOND F. MORROGH
Deputy Commonwealth's Attorney